A

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR

v.

B

MENTERI KESELAMATAN DALAM NEGERI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[APPLICATION REVISED COURT NO: R1-25-73-2008]
5 MAY 2008

C

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Leave to apply for judicial review - Whether applicant allowed to seek for reliefs sought - Rules of the High Court 1980, O. 53 r. 2(2)*

D

The applicant, *vide* an application for judicial review, sought for the applicant to be granted leave pursuant to O. 53 r. 3(1) of the Rules of the High Court 1980 to apply for the following declarations: (1)(i) that the decision of the respondents that the applicant's publication permit for the period 1 January 2008 until 31 December 2008 was subject to the Garis Panduan Penerbitan which prohibited the applicant from using the word 'Allah' in 'Herald – The Catholic Weekly' was illegal and null and void; (ii) that the applicant was entitled to use the word 'Allah' in 'Herald-The Catholic Weekly' and (iii) that the word 'Allah' was not exclusive to the religion of Islam and jointly or in the alternative prayer (2) for the applicant be granted leave pursuant to O. 53 r. 3(1) of the Rules of the High Court 1980 to apply for an order of *certiorari* to quash the impugned decision of the respondents. Briefly, the applicant is the publisher of 'Herald – The Catholic Weekly' ('the said publication') which was published on behalf of the Bishops of Peninsular Malaysia pursuant to a publication permit issued by the first respondent under the Printing Presses and Publications Act 1984. According to the respondents, the Ketua Setiausaha, Kementerian Keselamatan Dalam Negeri acting purportedly under the authority of the first respondent issued eight letters to the applicant to cease to use the word 'Allah' in the said publication. It was this impugned decision of the respondents which was being challenged in this application for judicial review for which the applicant was seeking reliefs alluded to earlier. The learned senior federal counsel (SFC) submitted that the application was irregular in that the application for *certiorari* should be the

E

F

G

H

I

main application whilst the prayer for declaration should be made jointly or in the alternative, if it was related to or was connected with the same subject matter. The SFC also objected to the prayers that the applicant was entitled to use the word 'Allah' in its publication and that the word 'Allah' was not exclusive to the religion of Islam on these grounds (a) both these rights were private rights which must be proved by oral evidence and it was improper and an abuse of the process of the court to declare these rights in an application for judicial review; the proper mode was by writ action or under s. 41 of the Specific Relief Act and (b) the issues pertaining to the two prayers above involved questions of fact to be decided by the court after hearing expert evidence on the subject matter.

Held:

(1) In an application for judicial review by virtue of para. 1 r. 2 of O. 53 of the Rules of the High Court 1980 read with para. 2 of r. 2 of the same Order, in particular the phrase 'may seek any of the said reliefs' refers to any of the reliefs specificed in para. 1 of the Schedule to the CJA and for the purposes of this case, it was the writ of *certiorari*. Thereafter, by virtue of the phrase including a prayer for declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter' in para. 2 of r. 2 of O. 53, in this instant case, the applicant may seek for the declaration of prayer 1(i) *ie* to declare the impugned decision as illegal, null and void. (para 7)

(2) It was premature to make any submission on which remedy was the appropriate remedy at the leave stage; the appropriateness or otherwise of the remedy is to be determined at the merit stage, where the court would have to fashion the remedy to suit the particular circumstances of the case. The objection of the learned SFC was in essence primarily procedural hovering on the distinction between private and public law remedies. (para 9)

(3) The language of O. 53 r. 2(2) of the Rules of the High Court 1980 emphasises on the reliefs in prerogative remedies and declaration may be applied either jointly or in the alternative in the same application for judicial review if it relates to or is connected with the same subject matter. Herein, the impugned decision provided that there was a condition to the

A applicant's publication permit, the effect of which the faith community of which the applicant was the head could not use a particular word *ie*, Allah and as to whether the applicant was correct or not was to be determined on its merits at the substantive hearing of the application of judicial review. B (para 10)

(4) The objection of the learned SFC with regard to prayer 1(ii) a declaration that the applicant was entitled to use the word 'Allah' in Herald – The Catholic Weekly' and prayer 1(iii) a C declaration that the word 'Allah' was not exclusive to the religion of Islam was without merit and was thereby dismissed. The court hereby allowed the applicant's application for leave pursuant to O. 53 r. 3(1) of the RHC. (para 11)

D *[Order accordingly.]*

Case(s) referred to:

Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1984] 1 AC 374 E ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors [2006] 4 CLJ 1 FC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA F ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)
Federal Constitution, arts. 10, 11
Legal Profession Act 1976, s. 46A G
Rules of the High Court 1980, O. 53 rr. 2(1), (2), 3(1)
Specific Relief Act 1950, s. 41

For the applicant - Porres Royan (Leonard Teoh, S Selvarajah, Annou Xavier & Derek Fernandez with him); M/s Fernandez & Selvarajah

For the Attorney General's Chambers - Azizah Hj Nawawi (Suzanna Atan H *with her) SFCs*

Reported by Suhainah Wahiduddin

I

JUDGMENT

Lau Bee Lan J:

[1] *Vide* an application for judicial review filed on 19 March 2008 (encl. 1) the applicant seeks the following reliefs:

1. That the Applicant be granted leave pursuant to Order 53 Rule 3(1) of the Rules of the High Court 1980 to apply for the following Declarations:

   (i) that the decision of the Respondents dated 12.2.2008 that the Applicant's publication permit No. PP 8460/12/2008 (020574) for the period 1.1.2008 until 31.12.2008 is subject to the "Garis Panduan Penerbitan" dated 1.3.2007 which prohibits the Applicant from using the word "Allah" in "Herald – The Catholic Weekly" is illegal and null and void;

   (ii) that the Applicant is entitled to use the word "Allah" in "Herald – The Catholic Weekly"; and

   (iii) that the word "Allah" is not exclusive to the religion of Islam.

2. Jointly or in the alternative, the applicant be granted leave pursuant to O. 53 r. 3(1) of the Rules of the High Court 1980 to apply for an order of *certiorari* to quash the decision of the respondents dated 12 February 2008 that the applicant's publication permit No. PP 8460/12/2008 (020574) for the period 1 January 2008 until 31 December 2008 is subject to the "Garis Panduan Penerbitan" dated 1 March 2007 which prohibits the applicant from using the word "Allah" in "Herald – The Catholic Weekly";

3. An order for stay of the decision of the respondents dated 12 February 2008 that the applicant's publication permit No. PP 8460/12/2008 (020574) for the period 1 January 2008 until 31 December 2008 is subject to the "Garis Panduan Penerbitan" dated 1 March 2007 which prohibits the applicant from using the word "Allah" in "Herald – The Catholic Weekly."

[2] The grounds in support of the application are that the respondents in making the decision dated 12 February 2008:

i) acted in breach of the rules of natural justice, procedural and substantive fairness and the duty to act fairly;

ii) asked the wrong questions in the decision making process;

iii) took into account irrelevant considerations;

iv) omitted to take into account relevant considerations;

v) acted in violation of the applicant's legal rights in line with the spirit, letter and intent of arts. 10 and 11 of the Federal Constitution;

vi) were irrational and unreasonable within the ambit of the principles laid down in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223;

vii) acted illegally, misconstrued and misapplied the relevant provisions of the Printing Presses and Publications Act 1984;

viii) imposed conditions on the appellant which are oppressive and onerous; and

ix) acted *mala fide*.

[3] Briefly, as can be gleaned from the affidavit in support of Y.Bhg. Datuk Murphy Nicholas Xavier a/l Packiam, who is holding the office of the applicant affirmed on 18 March 2008 (encl. 3) (English translation), the applicant is the publisher of "Herald – The Catholic Weekly" ("the said publication") which is published on behalf of the Bishops of Peninsular Malaysia pursuant to a publication permit issued by the 1st respondent under the Printing Presses and Publications Act 1984 (Act 301). According to the respondents, from May 1998 until September 2007, the Ketua Setiausaha, Kementerian Dalam Negeri and subsequently the Ketua Setiausaha, Kementerian Keselamatan Dalam Negeri acting purportedly under the authority of the 1st respondent issued eight (8) letters to the applicant to cease to use the word "Allah" in the said publication. *Vide* a letter dated 28 December 2007 (exh. MP18) the 1st respondent informed the applicant that its publication permit had been renewed in all four (4) languages and requesting for payment of RM800 or the issuance of the publication permit. On 15 February 2008 the applicant received an unsigned letter dated 12 February 2008 (encl. 19) from the Kementerian Dalam Negeri to the applicant enclosing the publication permit which states that the applicant's publication permit No. PP 8460/12/2008 (020574) is subject to the "Syarat-

Syarat Permit" on its reverse and the "Garis Panduan Penerbitan" issued by the Bahagian Kawalan Penerbitan dan Teks Al-Quran Kementerian Keselamatan Dalam Negeri dated 1 March 2007, in particular in para. 4.1.10. which provides "Penerbitan agama selain daripada Agama Islam dilarang menggunakan istilah-istilah khusus agama Islam iaitu Allah, Baitullah, Solat dan Kaabah kecuali bagi menerangkan istilah-istilah berkenaan" (the applicant's concern is the prohibition from using the word "Allah") ("the impugned decision"). It is this impugned decision of the respondents which is being challenged in this application for judicial review for which the applicant is seeking the reliefs alluded to earlier.

[4] In respect of the reliefs which the applicant seeks, at the outset it is to be stated the applicant indicated it was not pressing for prayer 3 in respect of stay of proceedings but reserved its right to come back to court in the event there was a change of circumstances; there was no objection from the learned SFC Puan Azizah Hj Nawawi on behalf of the Attorney General's Chambers and the court made no order.

[5] Further, the learned SFC on behalf of the Attorney General's Chambers is not objecting to the following:

(a) prayer 2, which is leave for an order of *certiorari* to quash the impugned decision; and

(b) prayer 1(i) which is leave for a declaration prohibiting the Applicant from using the word "Allah" in "Herald – The Catholic Weekly" is illegal, null and void.

Notwithstanding the non-objection, the learned SFC submitted that the application is irregular in that the application for *certiorari* (prayer 2) should be the main application whilst the prayer for declaration (prayer 1(i)) should be made jointly or in the alternative, if it relates to or is connected with the same subject matter.

[6] I am in agreement with the learned SFC save for her reference to only the prayer for declaration of prayer 1(i) for reasons which will become apparent later. Order 53 r. 2 of the Rules of High Court 1980 ("the RHC") provides:

> 2(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 111A.

A (2) An application for judicial review may seek any of the said reliefs, including a **prayer for a declaration,** either **jointly** or **in the alternative in the same application if it related to or is connected with the same subject matter.**

B (3) …

(4) Any person who is adversely affected by the **decision** of any public authority shall be entitled to make the application. (emphasis added)

C **[7]** Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) ("the CJA") read together with s. 25(2) of the same provides that the High Court shall have the additional power "to issue to any person or authority … writs, including writs of the nature of … *certiorari* …, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for D any purpose". Hence, in my view in an application for judicial review by virtue of para 1 of r. 2 of O. 53 of the RHC read with para 2 of r. 2 of the same order, in particular, the phrase "may seek any of the said reliefs" refers to any of the reliefs specified in E para 1 of the Schedule to the CJA and for the purposes of this case, it is the writ of *certiorari*. Thereafter, by virtue of the phrase, "including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter" in para 2 of r. 2 of O. 53, in this instant case, the applicant may seek for the declaration of prayer F 1(i) ie, to declare the impugned decision as illegal, null and void. As to the status of prayers 1(ii) and 1(iii) I will address it hereafter as both these prayers are objected to by the learned SFC.

[8] Prayers 1(ii) and 1(iii) are respectively prayers in which the G applicant seeks for a declaration:

(a) that the applicant is entitled to use the word "Allah" in Herald – The Catholic Weekly"; and

H (b) that the word "Allah" is not exclusive to the religion of Islam. The learned SFC objected to both these prayers basically on two grounds:

(a) both these rights are private rights which must be proved by oral evidence and it is improper and an abuse of the I process of court to declare these rights in an application for judicial review; the proper mode is by writ action or

under s. 41 of the Specific Relief Act; the applicant has commenced a writ action *vide* R2-22 12-2007. The cases of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 1 AC 374 at p. 408 E-F and *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon &Ors.* [2006] 2 CLJ 1 at p. 24 paras 19, 20 and 21 were cited;

(b) the issues pertaining to the two prayers involve questions of fact to be decided by the court after hearing expert evidence on the subject matter and the case of *Meor Atiqulrahman Ishak & Ors. v. Fatimah Sihi & Ors.* [2006] 4 CLJ 1 at p. 7 paras 11 and 13; p. 9 at para 17; p. 10 at para 22 was cited.

[9] With regret I find the contention of the learned SFC cannot be sustained. Firstly, I am in agreement with Mr. Porres Royan, the leading counsel for the applicant that at it is premature to make any submission on which remedy is the appropriate remedy at the leave stage; the appropriateness or otherwise of the remedy is to be determined at the merit stage, where the court would have to fashion the remedy to suit the particular circumstances of the case. Support for this can be found in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 cited on behalf of the applicant. In this case the appellant, an advocate and solicitor became the Vice President of a political party; he was dissatisfied with the statutory disqualification in s. 46 of the Legal Profession Act 1976 disqualifying him from holding office in the Bar Council; at the High Court he applied for leave for judicial review which was dismissed and his failure was wholly on procedural grounds. At the Court of Appeal the learned SFC submitted that his objection is essentially that the declarations sought by the applicant's written application cannot be granted even if he was right as they are not declarations that make a frontal attack upon the constitutionality of s. 46A of the Legal Profession Act but are declarations which even if the facts are proved, cannot be granted and is there frivolous and vexatious; whereas counsel for the appellant submitted that the objection was premature and could be taken at the hearing (per Gopal Sri Ram JCA). Immediately at p. 704 His Lordship said "These arguments of counsel on either side bring into sharp focus the divide between private and public law remedies". This is similar to the positions taken in the instant case where the objection of the learned SFC is in essence primarily procedural hovering on the distinction between private and public law remedies. Reverting to

A *Sivarasa Rasiah*'s case, the Court of Appeal rejected the argument of the learned SFC and at p. 707 opined "Since the High Court has ample power and jurisdiction to grant appropriate relief after hearing full argument on the substantive motion, the point about the motion paper suffering from inadequacies of drafting, justifiably
B made in present case, comes to naught. If the applicant has asked for remedies which he is patently not entitled to, but adduces facts and establishes ground entitling him to relief, it is of course open to the judge hearing the substantive motion to invite arguments on the grant of relief appropriate to the applicant's
C factual situation."

[10] Secondly, I am in agreement with Mr Royan that the language of O. 53 r. 2(2) of the RHC emphasises on the reliefs in prerogative remedies and declaration may be applied either jointly
D or in the alternative in the same application for judicial review if it relates to or is connected with the same subject matter. In this instant case, the impugned decision provided there is a condition to the applicant's publication permit, the effect of which the faith community of which the applicant is the head cannot use a
E particular word ie, "Allah" and as to whether the applicant is correct or not is to be determined on its merits at the substantive hearing of the application of judicial review. A similar reasoning applies in respect of prayer 1(iii).

F **[11]** For the reasons given, I find that the objection of the learned SFC with regard to prayer 1(ii) a declaration that the applicant is entitled to use the word "Allah" in Herald – The Catholic Weekly" and prayer 1(iii) a declaration that the word "Allah" is not exclusive to the religion of Islam is without merit
G and is thereby dismissed. The court hereby allows the applicant's application for leave pursuant to O. 53 r. 3(1) of the RHC as follows:

1. The applicant be granted leave pursuant to O. 53 r. 3(1) of the Rules of the High Court 1980 to apply for an order of
H *certiorari* to quash the decision of the respondents dated 12 February 2008 that the applicant's publication permit No. PP 8460/12/2008 (020574) for the period 1 January 2008 until 31 December 2008 is subject to the "Garis Panduan Penerbitan" dated 1 March 2007 which prohibits the applicant
I from using the word "Allah" in "Herald – The Catholic Weekly";

2. Jointly or in the alternative, that the applicant be granted leave to apply for the following declarations:

   (i) that the decision of the respondents dated 12 February 2008 that the applicant's publication permit No. PP 8460/12/2008 (020574) for the period 1 January 2008 until 31 December 2008 is subject to the "Garis Panduan Penerbitan" dated 1 March 2007 which prohibits the applicant from using the word "Allah" in "Herald – The Catholic Weekly " is illegal, null and void;

   (ii) that the applicant is entitled to use the word "Allah" in "Herald – The Catholic Weekly";

   (iii) that the word "Allah" is not exclusive to the religion of Islam; and

3. Costs be in the cause.